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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-723

UNITED STATES *ex rel.* JOSEPH A. TRIANO,

Petitioner,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY, HUDSON COUNTY COURT, LAW DIVISION, and JAMES T. O'HALLORAN, Prosecutor of Hudson County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Counter-Statement of Matter Involved

Hudson County Indictment No. 326-71 charged petitioner, Joseph A. Triano, with (Count One) bribery, contrary to the provisions of N.J.S.A. 2A:93-6, and (Count

Two) extortion, contrary to the provisions of N.J.S.A. 2A:105-1, and (Count Three) misconduct in office, contrary to the provisions of N.J.S.A. 2A:85-1 (Pa1 to 4).

On October 20, 1972, the jury returned a verdict of not guilty on Counts I and II of the indictment but announced that it could not agree on a verdict as to Count III; consequently, a mistrial was declared as to that count.

Thereafter, defendant moved to dismiss the third count of the indictment, charging misconduct in office, on grounds of double jeopardy, *res judicata* and collateral estoppel. On January 22, 1973, the Honorable Raymond W. Young, J.C.C., granted the motion on the ground of collateral estoppel (Pa5 to 20). The State appealed. On February 21, 1974, the New Jersey Superior Court, Appellate Division, reversed the trial judge's decision (Pa21 to 23). On April 30, 1974, the New Jersey Supreme Court denied certification. *State* v. *Triano,* 65 N.J. 280, 321 A.2d 241 (1974). On October 15, 1974, the Supreme Court of the United States denied a petition for a writ of certiorari. *Triano* v. *New Jersey,* —— U.S. ——, 95 S.Ct. 148.

The remaining count of the indictment was scheduled to be retried on January 24, 1975, before the Honorable Joseph M. Thuring, J.S.C.* On January 21, 1975, petitioner filed the instant petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. On January 23, 1975, the District Court issued an order staying the state court trial pending final

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*On January 20, 1975, a hearing was conducted by order of Judge Thuring to determine whether the State was precluded from substantively introducing at the retrial evidence of bribery and extortion upon which the first jury had exonerated the petitioner. The judge ruled that such evidence would not be barred.

determination of the instant proceedings. By its opinion and order of May 6, 1975, the District Court denied the petition (Pa27 to 50). However, on May 15, 1975, the District Court issued a certificate of probable cause for appeal from that denial (Pa51). Although the District Court refused to continue the stay of the state court proceedings pending appeal (Pa52), the United States Court of Appeals for the Third Circuit reimposed the restraints on the State on June 3, 1975. An appeal to that Court followed. On October 17, 1975, the Circuit Court issued a judgment order, without opinion, affirming the judgment of the District Court denying the writ (Pa53, 54). Petitioner now seeks a Writ of Certiorari. The underlying facts which gave rise to this litigation are not in dispute and may be quickly reviewed.

At petitioner's trial, Abraham Chasnoff, an attorney-at-law of the State of New Jersey, testified that one James Cairns was referred to him through the office of another attorney in Kearny. James Cairns had been charged with two motor vehicle violations by the Hudson County Police Department. Summons No. CA52000 charged the offense of driving while under the influence of alcohol and Summons No. CA53502 charged the offense of failure to obey an officer's signal.

On June 16, 1971, Chasnoff contacted the Hudson County District Court Clerk's Office, entered his appearance as counsel for Cairns and asked for an adjournment of the case from the scheduled June 18, 1971 hearing date. On this date, Chasnoff examined the defendant's copy of the drunk driving summons and discerned that the statute described therein was N.J.S.A. 39:4-50.

Chasnoff further testified that on June 25, he received a message that Joseph Triano, the Deputy Clerk of the Hudson County District Court, had called. Chasnoff tes-

tified that at that time the petitioner indicated that he would schedule the matter for a later date because the officers were angered over the circumstances surrounding Cairns' arrest and thus were reluctant to downgrade the charges. No other action with regard to the case of *State* v. *James Cairns* occurred until November 5, 1971.

On that date, Triano called Chasnoff and arranged to have the latter come to the District Court Clerk's Office to discuss the Cairns case. That afternoon Chasnoff met with Triano. At the meeting, the petitioner told Chasnoff that he had convinced the police officers to downgrade the case from an "A" offense (driving while under the influence) to the lesser offense of "B" (driving while impaired), and that Chasnoff would have to "bag them fifty dollars apiece," so that the officers would not appear in court and the case would be processed as a "B". Chasnoff indicated that he would go along, but needed time to get the money. Chasnoff was to contact Triano when he had the money and to deliver the money to Triano in an envelope. At that time arrangements would be made for a convenient date for disposition.

Subsequent to this conversation, Chasnoff went to the chambers of the Honorable Samuel A. Larner, Assignment Judge of Hudson County, and revealed to the judge the offer made by Triano. Chasnoff was then taken to meet with investigators of the Office of the Hudson County Prosecutor.

On November 15, pursuant to the investigators' instructions, Abraham Chasnoff returned to the Office of the Hudson County Prosecutor and placed a phone call to the petitioner. Attached to the telephone was a recording device that had been installed by the investigators. During this conversation, a hearing date, November 24, 1971, was established. Additionally, the petitioner told Chasnoff

what the fine would probably be and confirmed that the passage of money would occur in the manner previously described, and that the arresting officers would not be in court for the hearing. A tape recording was prepared of this conversation and was subsequently transcribed.

The next encounter between Triano and Chasnoff occurred on November 24, 1971. Chasnoff went to the Hudson County Administration Building where he was fitted with electronic recording devices. Additionally, Chasnoff was given an envelope with a hundred dollar bill in it. This bill had been initialed and the serial number recorded by Prosecutor's Investigator William Flannery on November 23, 1971.

Abraham Chasnoff then proceeded to the petitioner's office. A conversation ensued. In that conversation, Triano informed Chasnoff that everything was in proper order, and that the offense was going to be handled as a "B". Moreover, petitioner revealed his copy of the summons which had a "B". Triano further indicated that he was going to speak with the judge about the case, "show the judge the ticket and tell him what's what and so forth." Abraham Chasnoff then gave the envelope to Joseph Triano; the petitioner held it up to the light, folded it twice and placed it in the top left drawer of the safe. Thereafter, Chasnoff left Triano's office and proceeded to the corridor where he was met by investigators of the Prosecutor's Office; Chasnoff informed the investigators where the petitioner had placed the envelope.

Investigator Flannery testified that he and other investigators of the Prosecutor's Office had entered the Violations Bureau and observed the petitioner and placed him under arrest. A subsequent search of the safe revealed the envelope and the marked money contained therein.

Members of the Prosecutor's Office testified about the monitored conversations between Chasnoff and the petitioner. The jury was permitted to hear relevant portions of the two conversations. The jury was also permitted to see the marked one hundred dollar bill which was received into evidence, as well as the original summonses in both the altered and unaltered form.

Margaret Prendergast, who succeeded the petitioner as Deputy Clerk of the District Court, testified about the procedure of that court. She testified as to the manner in which tickets are entered into the docket book. Mrs. Prendergast further testified that Complaint Number CA52000 appeared in the docket book as a violation of N.J.S.A. 39:4-50. Yet, that same ticket appeared on Judge McCole's calendar for November 24, 1971, as a violation of N.J.S.A. 39:4-50B.

Inspector Edmund L. Burke of the Hudson County Police Department testified on behalf of the State about procedures employed by that department. The Inspector testified that there are four copies to each summons. The defendant receives one; the issuing officer retains one, and the remaining two are turned into the police department and subsequently forwarded to the Court. The Inspector testified that each summons is recorded in a ledger. Edmund Burke further testified that summons CA-52000 issued to James Cairns was recorded as a violation of N.J.S.A. 39:4-50. Moreover, Burke testified that it was the common practice of the officers to indicate N.J. S.A. 39:4-50 when the offense was driving while under the influence and N.J.S.A. 39:4-50B when the offense was driving while impaired.

Norman R. Sierfeld, the officer who issued summons CA52000, testified that he issued the summons to James Cairns for driving while under the influence of intoxicating liquor. This alleged offense was in violation of N.J. S.A. 39:4-50. Officer Sierfeld further testified that he never discussed the case of *State* v. *Cairns* with the petitioner. Additionally, the witness testified that he never received an offer to reduce the charge against James Cairns.

Ordway Hilton, a handwriting specialist, was called as an expert witness by the State. He testified that he could not conclusively state who added the letter "B" to the statutory designation on the summons. Mr. Hilton testified that "it was not possible because of the nature of the writing of the B and the manner in which B's are formed—."

Judge John McCole of the Hudson County District Court testified as a defense witness. He related that it was not within the scope of the petitioner's duties to alter a traffic summons. The Judge further testified that it was outside Triano's duties to discuss the downgrading of offenses.

Based on the foregoing, the jury acquitted petitioner of extortion and bribery, but was unable to reach agreement on Count III, misconduct in office.

REASONS FOR DENYING CERTIORARI

The constitutional doctrine of collateral estoppel has no application where the state moves all charges against an accused in a single trial and the jury's acquittal on two counts does not resolve in favor of the accused any factual issue necessary to convict on the remaining count upon which the jury could not reach a verdict.

Petitioner was tried on an indictment containing three separate counts. Count I charged that petitioner, as deputy clerk of the Hudson County District Court, had accepted a bribe, present or reward, in violation of N.J. S.A. 2A:93-6. Count II alleged that, under color of his public office, petitioner had accepted a fee or reward not lawfully due him, in violation of N.J.S.A. 2A:105-1. Count III accused petititioner of misconduct in his public office by reason of his actions with regard to a certain case pending in the Hudson County District Court, in violation of N.J.S.A. 2A:85-1. All three counts arose out of a course of events related to the same case then pending in the County District Court (Pa1 to 4). After a 17 day trial, the jury acquitted petitioner on Counts I and II, but was unable to agree on Count III. Petitioner here asserts that the Fifth Amendment guarantee against double jeopardy prohibits the retrial of the remaining count of the indictment because the state is collaterally estopped from instituting that prosecution.* Respondents disagree.

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* Petitioner does not argue, nor on the basis of this record can he argue, that retrial is barred by traditional double jeopardy principles because there was no "manifest necessity" for dismissal of

(Footnote continued on following page)

In *Ashe* v. *Swenson,* 397 U.S. 436 (1970), the United States Supreme Court elevated the doctrine of collateral estoppel to constitutional dimension by incorporating it into the Fifth Amendment's protection against double jeopardy. The facts which gave rise to this decision may be briefly summarized. Six men were playing poker in the basement of the home of one of the players. In the early morning hours, three or four masked men, armed with a shotgun and pistols, burst into the basement and robbed each of the players of money and personal articles. The robbers then fled in a car belonging to one of the player victims. The police located the abandoned stolen car in a field and later that morning arrested three men who were walking nearby. Defendant was arrested separately some distance away. At the trial of defendant for robbing Donald Knight, one of the poker players, the prosecution produced four of the poker players as witnesses. These men testified to the uncontroverted fact that a robbery occurred during the poker game and that three or four masked, armed men relieved each of the players of his valuables. However, the testimony was weak on the critical issue of defendant's identity as one of the robbers, and this became the single contested fact at the trial. Despite an instruction by the trial court that defendant would be guilty of the robbery of Knight if de-

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(Footnote continued from preceding page)

the jury for failure to reach a verdict. See *United States* v. *Perez,* 9 Wheat. 579 (1824); *Downum* v. *United States,* 373 U.S. 734, 736 (1963). The jurors deliberated on the third count for the better part of two days and, after being given every opportunity to reconcile their differences, reported they were hopelessly deadlocked. See *United States* v. *Logan,* 144 U.S. 263 (1892); compare *United States ex rel. Russo* v. *Superior Court,* 483 F.2d 7 (3 Cir. 1973), *cert.* denied 414 U.S. 1023 (1973).

fendant was one of the participants in the crime, whether defendant personally took the articles from Knight or not, the jury returned a verdict of not guilty. Following the acquittal, the defendant was brought to trial for the robbery of one Roberts, another player at the poker game. After defendant's motion to dismiss on the grounds of double jeopardy was denied, the prosecution introduced essentially the same case with the exception that one particularly poor prosecution witness was not recalled at the second trial and the identity testimony was much stronger. The defendant was convicted and after his appeals were rejected in the state courts he brought an action for habeas corpus Ultimately, the Supreme Court granted certiorari to review the merits of defendant's petition.

The Court began its analysis by noting that the Fifth Amendment guarantee against double jeopardy had recently been made applicable to state prosecutions. *Benton* v. *Maryland,* 395 U.S. 784 (1969). Therefore, the question was not one of due process, but rather whether the doctrine of collateral estoppel was part of the Fifth Amendment. The Court concluded that collateral estoppel, as developed and applied in earlier federal cases, would have to be a part of the double jeopardy guarantee in order to protect an individual who has been acquitted from having to again "run the gauntlet." *Id.* at 446. The doctrine provides "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson, supra* at 343. Thus,

> Where a previous judgment of acquittal was based upon a general verdict . . . (the rule of collateral estoppel) requires a court to examine the record of a prior proceeding, taking into account

> the pleadings, evidence, charge and other relevant matter, and conclude *whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. Id.* at 333. (emphasis added)

Applying this rule to the case before it, the *Ashe* Court found that the acquittal in the first trial could only mean that the jury had a reasonable doubt that defendant was one of the robbers. The Court concluded that the prosecution could not hale the defendant before a second jury to attempt to prove the same fact more convincingly. In sum, the Court felt that the prosecution had presented the same case twice, refining its second presentation in light of its first failure, and this was precisely what the constitutional guarantee forbids.

It is respondents' belief that the constitutional doctrine of collateral estoppel, adopted and applied in *Ashe,* has no application to the instant case. Here, the prosecution in good faith sought a complete resolution of all matters arising out of petitioner's alleged criminal conduct with respect to a particular matter then pending in the County District Court. All charges against petitioner were tried together before a single jury and the prosecution stood to win or lose entirely, just as petitioner did. See *State* v. *Gregory,* 66 N.J. 510, 333 A. 2d 257 (1975) (adopting prospectively a rule of compulsory joinder in New Jersey). Through no fault of the prosecution, the jury was unable to agree on the third count of the indictment, although it did acquit petitioner on the first two counts.

This situation differs in a fundamental respect from that considered in *Ashe,* where the prosecution purposely chose to try the defendant for robbery of only one of the

victims. Thus, the defendant in *Ashe* was put into jeopardy at the first trial without hope that he would be able to exonerate himself in one proceeding. When the prosecution failed to convince the first jury that petitioner was present at the robbery scene, it simply selected another of the victims and began a second prosecution which forced defendant to relitigate an essential issue which he had already successfully contested in the first trial. It was this harassing and oppressive behavior by the prosecution, whereby it could effectively practice its presentation and then reprosecute more efficiently, that was condemned by the *Ashe* Court. None of the factors which prompted the disproval in *Ashe* are present here. Nor has the United States Supreme Court ever applied the constitutional rule of collateral estoppel to cases such as the instant one. See *Turner* v. *Arkansas,* 407 U.S. 366 (1972); *Harris* v. *Washington,* 404 U.S. 55 (1971); *Simpson* v. *Florida,* 403 U.S. 384 (1971). Thus, respondents submit that the embodiment of collateral estoppel in the Fifth Amendment guarantee against double jeopardy does not require application of that doctrine here. However, to further evidence the strength and logic of their position, respondents would briefly review the background, purpose and motivation for the *Ashe* decision.

The policies and purposes behind the traditional double jeopardy guarantee are well defined. See, *e.g., United States* v. *Jorn,* 400 U.S. 470, 479-480 (1971); *Green* v. *United States,* 355 U.S. 184 (1957). Essentially, the State, with all its power and resources, should not be permitted to make several attempts to convict a defendant for an alleged criminal act. Successive prosecutions cause the defendant expense, embarrassment, ordeal, anxiety and the insecurity of knowing that the end of one trial may not be the end of his troubles. *Green* v. *United States, supra* at 187-190; Comment, "Criminal Procedure-Double Jeop-

ardy-Trial Courts Granted Broad Discretion to Determine 'Manifest Necessity' for Mistrial," 26 *Rut.L.Rev.* 683, 684 (1973). Moreover, the state ought not to be allowed to retry a defendant with a view toward finding the right set of facts which will produce a conviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 734 (1969) (Justice Douglas, concurring); "Collateral Estoppel Is Constitutionally Required In Criminal Cases Because It Is Embodied In The Fifth Amendment Double Jeopardy Clause—*Ashe* v. *Swenson,*" 69 *Mich.L.Rev.* 762, 767 (1971). Nor should the state be free to employ the criminal process as a means of harassment of an individual. *North Carolina* v. *Pearce, supra* at 733 (Justice Douglas, concurring); Note, *supra,* 69 *Mich.L.Rev.* at 767.

At common law and during the early statutory development of the criminal law, the double jeopardy principle provided an accused with adequate protection against the abuses outlined above. See Note, *supra,* 69 *Mich.L. Rev.*; Comment, "Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee," 65 *Yale L.J.* 339, 341-343 (1956). The evolution of the criminal law, however, stripped the doctrine of much of its utility. The increased number of statutes under which a single criminal act may be prosecuted opened the defendant to multiple prosecutions for an essentially unitary criminal episode. In light of the differing shades of criminality covered in these statutes, the "same evidence" test was of little aid to the harried defendant. See Note, "Double Jeopardy and the Multiple Count Indictment," 57 *Yale L.J.* 132, 133 (1947). This development, among others, exposed the guarantee against double jeopardy as a doctrine of limited protective value.

Recognizing the need to breathe new vitality into a collapsing principle, the federal courts (see *e.g., Sealfon* v.

United States, 332 U.S. 575 (1948)), and many other jurisdictions, including New Jersey (see *e.g., State* v. *Cormier,* 46 N.J. 494, 218 A.2d 138 (1966)), applied collateral estoppel to criminal cases. And, it is clear the doctrine is well-suited to accomplish its purpose.

The basic policy considerations of collateral estoppel, when it is applied to criminal cases, are virtually identical to the objectives of the traditional double jeopardy rule barring reprosecutions after acquittal. It is intended to protect an individual from harassment, embarrassment, anxiety, etc. See Meyers and Yarbrough, "Bix Vexari: New Trials and Successive Prosecutions," 74 *Harv.L.Rev.* 1, 32-33 (1960). The principle, while identical in purpose, applies to situations not covered by the traditional double jeopardy guarantee, but rife with the very abuses which the latter doctrine was meant to eliminate.

It was from this background and the then recent holding of *Benton* v. *Maryland, supra,* that the *Ashe* rule grew. 397 U.S. 443, n.10. And, viewed in this context it is difficult to see how it can be said collateral estoppel as a constitutional doctrine can apply to the case at bar. Under these circumstances in no sense is there any harassment or oppression or multiple prosecution which the *Ashe* Court found repugnant. On the contrary, the State, in good faith, prosecuted its charges in a single trial. A retrial would entail no more embarrassment, expense or ordeal for the defendant than would exist on a retrial on a single count indictment where the jury disagrees—a thoroughly proper procedure. *United States* v. *Perez,* 9 Wheat. 579 (1824); see *Downum* v. *United States,* 372 U.S. 734, 736 (1963). Yet, the State's vital interest in enforcing the criminal laws would be severely impaired by barring reprosecution.

These compelling policy considerations prohibit the application of collateral estoppel to the instant case without regard to the question whether the jury acted consistently in acquitting petitioner of the first two counts and failing to agree on a verdict on the third count. However, if it is assumed that petitioner is correct in his position that the jury inconsistently failed to acquit him on the remaining count, it is at once apparent that collateral estoppel cannot be rationally or practically applied.

As noted above, *Ashe* requires a court to examine the record of the prior proceeding and assess the evidence, instructions and other relevant material in order to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 443. Clearly, application of this standard cannot lead to a determination where jurors, or at least some of them, have been inconsistent in their verdicts. This inconsistency must be considered as part of the practical framework of the proceedings. The most that can be said in such cases is that the verdict shows that either in the acquittal or the disagreement the jury did not speak its real conclusions. See *Dunn* v. *United States,* 284 U.S. 390, 394 (1932); *Steckler* v. *United States,* 7 F. 2d 59, 60 (2 Cir. 1925). There is no reason to conclude that the misstatement is to be found in the deadlock rather than in the acquittal. A determination as to what was resolved in these circumstances would involve pure speculation, a process not embodied in the *Ashe* test for determining what was ultimately determined in the first trial. Even if collateral estoppel applies in theory to this proceeding, in practice it can never bar retrial. Thus, the very inconsistency, which petitioner argues bars a retrial in this case, in fact, compels a contrary conclusion.

Respondents acknowledge that the foregoing analysis appears to have been implicitly disapproved in *United States ex rel. Rogers* v. *LaVallee,* 517 F.2d 1330 (2 Cir. 1975), a case upon which petitioner places heavy reliance. In *Rogers,* the defendant had been charged in a New York State prosecution with kidnapping. Under the New York statutory scheme, kidnapping is classified according to degree and petitioner was alternatively charged in two of the counts with various forms of first degree kidnapping. At the trial, the court erroneously instructed the jury that it should determine whether defendant was guilty under each count of the lesser offense of simple abduction, an offense included within all types of first degree kidnapping. The jury returned verdicts of not guilty as to first degree kidnapping and simple abduction under one of the counts, but was unable to reach any verdict under the remaining kidnapping charge. The trial court declared a mistrial on that count and defendant was subsequently retried and convicted.

After his petition for habeas corpus was denied by the United States District Court, Rogers sought review in the Second Circuit Court of Appeals. The majority of the three judge panel ruled that the verdicts of acquittal at the first trial determined that defendant had not committed even simple abduction. Therefore, the majority concluded, the state could not retry defendant on the remaining kidnapping charge which included the component of simple abduction.

Aside from the propriety of its result, *Rogers* is clearly distinguishable from the present matter. The majority there emphasized that the trial court had created the incongruity by its plainly erroneous instruction and its failure to recognize the contradiction in the jury's verdicts. More importantly, the prosecution was deemed to be

"equally at fault" by not objecting to the instructions or to the form of the verdict as rendered. In addition, the majority pointed out that the jury had expressly declared that defendant was not guilty of simple abduction. For these reasons, the Court felt that the policy of collateral estoppel prohibited the retrial. In the instant matter, there is no indication of prosecutorial error. Nor did the jury's verdict explicitly decide against the State any factual issue necessary to conviction on the remaining count. Thus, petitioner may not draw support from *Rogers.*

Even if *Rogers* is not distinguishable in principle from the present matter, respondents submit that it should not be followed. As Judge Lumbard pointed out in his dissent, the defendant could not argue that the jury at the first trial had acquitted him of the necessarily included offense when "in virtually the same breath the foreman stated that the jury was deadlocked not only on simple abduction under count four, but on the primary charge under count four of kidnapping resulting in death." *Id.* at 1336. As demonstrated above, such a contradiction renders impossible any meaningful application of the *Ashe* rule.

Petitioner here contends that this Court should grant *certiorari* to resolve an alleged conflict between federal circuits. He asserts that the Third Circuit has now adopted a position on collateral estoppel which is directly opposed to the Second Circuit's decision in *Rogers.* This assertion is completely unfounded. The Third Circuit wrote no opinion in this matter but simply issued a judgment order which affirmed the judgment of the District Court. It is inconceivable that by its action the Third Circuit intended to even consider a significant issue of constitutional law. This is especially clear in light of the fact that the District Court decided the matter on

narrow grounds without reference to these issues. Thus, there is no conflict among the circuit courts on this question.

Notwithstanding that the foregoing discussion touches upon interesting issues of constitutional dimension, the instant matter simply does not require their determination. Rather, this case is easily resolved on a purely factual basis which involves nothing more than the application of well-established and undisputed principles of law. An examination of the pleadings and evidence adduced at the trial demonstrates convincingly that the jury "could have grounded its verdict upon an issue other than that which the [petitioner] seeks to foreclose from consideration." *Ashe* v. *Swenson, supra* at 443.

The first count of Indictment No. 326-71 charged bribery, under N.J.S.A. 2A:93-6, in that the petitioner, the Deputy Clerk of the Criminal Division of the District Court, on November 24, 1971, did "willfully, knowingly, unlawfully and corruptly receive approximately $100 in cash as a *bribe, present or reward*" in return for obtaining an improper disposition of a pending criminal complaint. (emphasis added).

The second count charged extortion, under N.J.S.A. 2A:105-1, in that the petitioner on November 24, 1971, did "willfully, knowingly, unlawfully and by color of his office . . . receive and take from Abraham J. Chasnoff . . . a *fee and reward* in the amount of approximately One Hundred Dollars ($100.00) in cash, the same not allowed by law to the same Joseph A. Triano for performing his duties as Deputy Clerk of the Criminal Division of the Hudson County District Court." (emphasis added).

At the trial, the key prosecution witness, Abraham Chasnoff, Esq., testified that petitioner had indicated to

him that a traffic summons pending against Mr. Chasnoffs' client could be modified to state a lesser charge. However, according to Chasnoff, petitioner had related that the two police officers who had issued the summons would not acquiesce in the proposed downgrade unless petitioner could "bag them fifty dollars apiece." After reporting this incident to the appropriate authorities, Mr. Chasnoff obtained a marked $100 bill from the Hudson County Prosecutor's Office. After placing the bill in an envelope, pursuant to petitioner's instructions, Mr. Chasnoff brought that envelope to petitioner's office where he conversed with petitioner about the summons and then handed the envelope to him. Petitioner took the envelope, held it up to the light, folded it and placed it in the safe in his office. After Chasnoff left petitioner, he met with investigators from the Prosecutor's Office who entered petitioner's office, arrested him and removed the envelope from the safe.

The above summary demonstrates that the prosecution's own case had introduced an uncertainty as to whether petitioner had received the $100 bill for his own use and benefit or whether he had acted as the conduit for the two arresting officers. Since the evidence of petitioner's actual receipt of the money was overwhelming, the question whether he was to be the beneficiary became critical in light of the trial court's instructions to the jury. The trial court told the jury that, to find petitioner guilty of bribery under Count I, petitioner must have received an "undue reward" and must have acted with an intent to acquire "an unlawful personal benefit or advantage."*

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* It is noted that, as a matter of state law, personal gain is not a requisite element of bribery. See *State* v. *Begyn*, 34 N.J. 35, 167 A.2d 161 (1961). However, this error could only have increased the burden on the prosecution and provided an undue advantage to petitioner. Understandably, petitioner has never objected to this instruction which is so pivotal to the present discussion.

Similarly, in instructing on the elements of extortion under Count II, the trial court advised the jury that petitioner must have taken a fee or reward, not allowed by law, for performing the duties of his office. Further, the court repeated that petitioner must have taken money "not due to him" and continued that this undue taking occurs when an officer "receives a fee or reward to which he is not legally entitled by reason of or in connection with his official duties."

Clearly, the effect of these instructions was to convince the jury that petitioner could not be guilty under Count I or Count II unless he intended to, and did, accept the $100 bill for his own personal gain. Indeed, the District Court below explicitly agreed with this analysis (Pa44 to 48). Thus, the jury could well have acquitted petitioner on these counts precisely because it was unable to find this "personal gain" element beyond a reasonable doubt. Not by coincidence, the trial court's instruction on the remaining count was expressly to the contrary as regards petitioner's benefit and gain.

Count III charges that, between November 5 and 24, 1971, petitioner "wilfully, maliciously and corruptly violated his duty to the public" to fairly and justly process all complaints and summonses, "and did misperform and misconduct duties of his said office, as the same related to the case of State of New Jersey v. James M. Cairns . . . by undertaking to . . . dispose of . . . said case in an unfair, partial and unjust manner" by committing several acts of misconduct. The count continues by listing three alleged acts of misconduct in three subparagraphs. The first of these paragraphs alleges that petitioner represented to Abraham Chasnoff that petitioner would obtain the consent of the officers who issued the summons to a disposition of the case favorable to Mr. Chasoff's client

if Chasnoff would supply a sum of money to petitioner who would in turn transmit the money to the officers. The second paragraph asserts that petitioner improperly amended the summons to reflect a violation of N.J.S.A. 39:4-50B, a lesser offense than that charged originally in the summons, to wit, a violation of N.J.S.A. 39:4-50. The third paragraph claims that petitioner received $100 from Mr. Chasnoff in exchange for petitioner's undertaking to influence the favorable disposition of the pending summons as aforesaid.

In its instructions on Count III, the trial court plainly excluded the element of personal gain from the offense charged.

> To prove criminal intent—that is, bad faith or evil motive or dishonesty, it is not necessary however for the state to adduce proofs from which it could be inferred that the defendant intended to profit or otherwise benefit from the acts alleged to have been done by the defendant or omitted by the defendant.

This instruction was repeated when the jury requested to be reinstructed on the law governing Count III. Beyond cavil, the jury must have understood that, unlike the principles governing Counts I and II, the personal gain or advantage of petitioner formed no part of the offense alleged in Count III. Again, the District Court reached the same conclusion below (Pa48).

Respondents respectfully submit that the above analysis resolves any question regarding the propriety of petitioner's retrial under Count III. The jury could, and most probably did, conclude that there was a reasonable doubt whether petitioner had accepted the $100 bill for himself, rather than for the police officers. Therefore,

the jury acquitted petitioner of Counts I and II. However, the jury was not required to find this same element of personal gain in order to convict petitioner of misconduct in office under Count III. Therefore, the jury's inability to reach a verdict on that charge was due to its disagreement on some other point not readily apparent. In any event, the prosecution at the retrial will not be required to prove that petitioner acted for personal gain in order to convict him of misconduct. See *State* v. *Begyn, supra.* Consequently, petitioner will not be haled before a second jury and forced to relitigate a critical issue on which he has already defended successfully. *Ashe* v. *Swenson, supra.* In short, collateral estoppel presents no obstacle to the retrial of Count III.

Finally, respondents would comment that petitioner appears to be asserting that, regardless whether the remaining count of the indictment may be retried, this Court should decide whether certain evidence will be admissible on the retrial. Although petitioner's contentions in this regard are anything but clear, respondents adamantly oppose any consideration of potential evidentiary rulings and admissions at the much delayed retrial. The question of what evidence will be admitted at a state trial is one which a federal court must be extremely reluctant to take up prior to the completion of the state prosecution. See *Helfant* v. *Kugler,* 95 S.Ct. 1524 (1975); *Stefanelli* v. *Minard,* 342 U.S. 117 (1951). Further, there has been no exhaustion of state remedies on this issue, as contrasted to the issue of the propriety of the retrial itself. Thus, the state judiciary has not had a full opportunity to consider this question. For that reason, petitioner must demonstrate an "extraordinary circumstance" in order to have this Court intervene. *Moore* v. *DeYoung,* 515 F.2d 437 (3 Cir. 1975). However, it is obvious that no such circumstance exists to now justify review of the

expected evidentiary rulings at the retrial. Once it is determined, as it must be, that the retrial itself is not barred, petitioner will suffer no irreparable injury by being forced to contest the alleged evidence problems during that prosecution. See *Younger* v. *Harris,* 401 U.S. 37 (1971). While it will not cause petitioner undue hardship to timely present his objections to the state courts, intervention at this juncture would irrevocably damage the sensitive relations between this Court and the state judiciary. Petitioner must not be permitted to pervert the Great Wit "into a pretrial-motion forum for state prisoners." *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 508 (1973) (Rehnquist, J., dissenting).

In any event, collateral estoppel as an element of the guarantee against double jeopardy does not serve to bar the mere introduction of evidence at subsequent trials. Rather, as discussed above, collateral estoppel was incorporated into the Fifth Amendment by *Ashe* in order to supplement and bolster the protections afforded by the double jeopardy clause. That clause is intended to prevent vexatious and unfair retrials. It is not concerned with the evidence to be introduced, once it is found that the retrial will be allowed. See, *e.g., Ashe* v. *Swenson, supra* at 446; *Sealfon* v. *United States, supra; Yates* v. *United States,* 354 U.S. 298 (1957); *United States* v. *Kills Plenty,* 466 F.2d 240 (8 Cir. 1972), *cert.* den. 410 U.S. 916 (1973); *United States* v. *Castro-Castro,* 464 F.2d 336 (9 Cir. 1972), *cert.* den. 410 U.S. 916 (1973); *United States* v. *Pappas,* 445 F.2d 1194 (3 Cir. 1971), *cert.* den. 404 US. 984 (1971); *United States* v. *Nash,* 447 F.2d 1382 (4 Cir. 1971); *United States* v. *Fusco,* 427 F.2d 361 (7 Cir. 1970); but see *Phillips* v. *United States,* 518 F.2d 108 (4 Cir. 1975). One Circuit Court of Appeals has ruled flatly that collateral estoppel does prohibit reintroduction of evidence at a retrial. *Wingate* v. *Wainwright,* 464 F.2d

209 (5 Cir. 1972). However, that Court has recognized that its ruling in *Wingate* "significantly expanded the *Ashe* holding." *Blackburn* v. *Cross,* 510 F.2d 1014, 1017 (5 Cir. 1975). Thus, the *Wingate* interpretation of collateral estoppel is admittedly not justified by the ruling in *Ashe* but is a policy decision independently reached by the Fifth Circuit. See also *McDonald* v. *Wainwright,* 493 F.2d 204 (5 Cir. 1974). At least one federal court has specifically disapproved that decision. *United States* v. *Addington,* 471 F.2d 560, 567, n.5 (10 Cir. 1973).

The above authority demonstrates that the majority of federal courts considering the question have ruled that collateral estoppel as a constitutional precept is not a rule of evidence. This view comports fully with the historical and conceptual basis for the embodiment of collateral estoppel in the guarantee against double jeopardy. Thus, petitioner may not avail himself of the doctrine to prevent the state from using again the evidence introduced at the prior trial. Indeed, petitioner has made no effort to demonstrate which evidence would have been precluded even if his view of collateral estoppel were correct. Respondents would conclude by simply noting that the evidence at the retrial will not be introduced for the purpose of showing that petitioner accepted the $100 bill for his own gain or benefit. Rather, the evidence of petitioner's receipt of the money is directly relevant and material to the remaining count of misconduct. Clearly under any theory of collateral estoppel, there would be no bar to the state employing this evidence for that purpose at the second trial. *United States* v. *Pappas, supra.*

It has long been the practice of this Court not to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. *Burton* v. *United States,* 196 U.S. 283, 295 (1905); *Liverpool, N.Y. & P.S.S. Co.* v.

Emigration Commissioners, 113 U.S. 33, 39 (1885); *Ashwander* v. *TVA,* 297 U.S. 288, 346-348 (1936) (Brandeis, J., Concurring). From the foregoing it is manifestly clear that no constitutional issue need be decided in this matter. Indeed this case involves nothing more than the routine application of well-established principles of law to an unremarkable factual setting. Hence there is no cause for review by this Court.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the writ of *certiorari* should be denied.

Respectfully submitted,

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